FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

Nos. 403, 404

GEORGE ASHWANDER, et al.,
Petitioners,

v.

TENNESSEE VALLEY AUTHORITY, et al.,
Respondents.

BRIEF FOR RESPONDENT ALABAMA POWER COMPANY

THOMAS W. MARTIN
PERRY W. TURNER
WM. LOGAN MARTIN
Attorneys for Respondent Alabama Power Company

MAPP, TURNER & MCWHORTER
Counsel.

BIRMINGHAM PRINTING CO.

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ALABAMA POWER COMPANY

STATEMENT OF FACT AND POSITION OF ALABAMA POWER COMPANY

The original bill was filed in this case on September 13, 1934 (Record Vol. I, p. 205). The Tennessee Valley Authority filed its petition for removal on September 25 (I-209).

The controversy on this record, as stated by Tennessee Valley Authority in its petition for removal, included:

> "* * * (4) The legality of the various contracts and agreements described in the original bill of complaint, and alleged to have been executed under the authority of the Tennessee Valley Authority Act herein above referred to.
>
> "(5) The legality of the entire program of the respondent Tennessee Valley Authority under the Tennessee Valley Authority Act and the Constitution of the United States. * * * *" (I-212)

At the time the bill of complaint was filed, TVA was proceeding with its program in Alabama of electric service to the public, asserting that Section 11 of the Tennessee Valley Authority Act, contemplated sale and distribution by it of power throughout transmission distance. The steps being taken to accomplish that end may be summarized:

(a) An announced high tension transmission line connecting Muscle Shoals steam-electric and hydro-electric plant with Wheeler and Norris Dams. (II-533, 586, 595, 647, 669)

(b) So-called rural transmission lines radiating from Muscle Shoals. (II-546-7, 556, 621, 647, 666)

(c) Negotiations with all applicant towns for immediate service within the area of the contract of January 4, 1934; and for service outside that area, deferred only as to the time for beginning actual delivery. The negotiations were not suspended by the contract. (II-508, 621, 630, 644, 660)

(d) Uniform agreements committing TVA to long term contracts for the supply of electricity for all customers within reach of TVA transmission or distribution lines, preferably publicly owned systems. (II-661, 1202, 1216).

(e) At the time of the trial and decree, TVA had made specific contracts with several of the defendant towns to serve their proposed competitive systems for 20 year periods (II-660).

(f) Formal announcement by TVA that it must procure or take a market for the capacity of its plants, (II-620, 637) then in production and under construction or hereafter determined upon without any supervision or control, such as this company was under; the final distribution to the consumer to be preferably made through publicly owned systems in accordance with Section 10 of the TVA Act but in the absence of adequate outlets there, to be by direct distribution by TVA from power house to consumer. (II-420, 426, 433, 542)

(g) Section 15 of the TVA Act, authorizing $50,000,000 of United States Bonds without further authority from Congress, for any dam, steam plant or other facility whatever, for generation or transmission. This provision is without standard or limit.[1] Section 15 (a),

[1]Electric power companies were required by Section 49 of the Alabama Public Utility Act of 1920 (Code of Alabama, 1923, Section 9795) to obtain certificate of convenience and necessity before constructing plants or lines; were required also by Sections 4 and 9 of the Federal Water Power Act of June 10, 1920, and the regulations issued thereunder to show the area proposed to be served and the market requirements. The record shows that by far the larger part of the investment of the Company was made after the enactment of these statutes, state and federal, and in compliance with their terms (I-190, 192, 196, 201-2).

aided by the Amendment of 1935, authorized another $50,000,000 to finance publicly owned distribution systems "to facilitate the disposition of the surplus power of the corporation."

(h) The following statutes indicate the unlimited nature of federal funds made available to the Administration in support of the program, apparently in the unregulated discretion of the Executive, among which are included the specific appropriations which have been made since the filing of suit:

1. The Act "For the relief of unemployment through the performance of useful public work, and for other purposes," approved March 31, 1933 (48 Stat. 22).

2. Fourth Deficiency Act, Fiscal 1933, approved June 16, 1933 (48 Stat. 974). Three billion three hundred million, of which $50,000,000 was allocated to TVA by that Act.

3. Act approved Feb. 15, 1934 (48 Stat. 351). Nine hundred fifty million.

4. Emergency Appropriation Act, Fiscal 1935, approved June 19, 1934 (48 Stat. 1055). Eight hundred ninety nine million. The Treasury Statement of August 1, 1934, showed that 25 million of this was allocated to TVA.

5. Emergency Relief Appropriation Act of 1935, approved April 8, 1935 (Pub. Res. No. 11, 74th Congress). Four billion.

6. Second Deficiency Appropriation Act of 1935 (Pub. No. 260, 74th Cong., approved August 12, 1935).

(i) As incidents in this program, TVA held at the time the suit was filed (a) the contract of January 4, 1934, ceding utility properties, service area and going business, and (b) the option-agreement of August 9, 1934, with reference to the purchase of seventeen urban distribution systems of the Power Company.

The contracts of January 4 and August 9 were on the whole minor elements both in the TVA program and in the threat of destructive competition with Alabama Power Company.

Contract of January 4 and Option of August 9, 1934

The contract of January 4, 1934, was executed under the circumstances outlined below, as presumably the lesser of two evils, holding out a hope or a possibility that the encroachment of the TVA program would be halted or at least delayed. Later events however showed that this hope was without foundation. The option of August 9 followed inevitably from the previous agreement on demand by TVA, accompanied as it was by the aggressive threat and certainty of competitive duplication by TVA and the Federal Emergency Administration of Public Works. Beyond and surrounding these contracts there extended the full momentum of the TVA program, with no interruption whatever in the negotiations by TVA for extensions, as formally warned by TVA (II-508).

Position of the Respondent Company

It cannot be and is not denied by this Company that this Company's existence and business in its entirety, and not merely within the ceded area, is now threatened by the TVA program.

Under these circumstances the Company has stated on this record and here repeats that while the management acted in good faith in entering into the agreement of January 4, 1934, and in its inevitable corollary on demand by TVA (and on the terms dictated by TVA) in executing the option of August 9, and would have carried out those agreements in due course, and did not in any sense whatever procure the institution of this suit, the management must state that it now recognizes that this suit is likely to avoid initial, progressive and final disintegration of the Company's business, franchises and property from a region-wide violation of Federal function by the Tennessee Valley Authority.

In the light of events shown by this record now seen to be plain both from the statute and from the public acts and declarations of TVA and associated agencies of the Federal Government, it is apparent that the contract and option would have accomplished a useless sacrifice of corporate properties, business and franchises for a fraction of their value.

This conviction on the part of the management has not resulted from any change of view as to the illegality of the program. It has resulted from a complete realization that the partial sacrifice of properties and business inherent in the contract of January 4, 1934, was, in fact, a futile effort to gain time in the hope of a change or

retreat, a vain hope that the extraordinary tension surrounding the exploitation of this TVA program would subside or that its manifest injustice to the utilities in the area and its manifest violation of federal function would be recognized by the Federal Government.

There was not in the Act or in the program any evidence that TVA would give due consideration to the rights of the Company or fair play with it and its security holders. Disaster seems inevitable unless the illegality of the program is adjudicated by this Court.

This conviction is evident from the progress of events on and following the filing of the suit.

The answer of the Company filed November 9, 1934 (I-300), did not challenge the propriety of the suit or the basic averments or the consequences asserted. See Sections 17 and 19, excerpted in the margin.[2]

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[2] "17. As to the averments contained in Paragraph 17 respondent company admits that the public statements of TVA indicated the program therein alleged; and the directors of respondent company considered that to vest such an agency as therein alleged with unlimited power and access to public funds, in a program of business competition and public ownership promotion in the area served by respondent company would in effect destroy this respondent's property; and such conclusion on its part was the principal inducement for it to enter into the contracts of January 4 and August 9, 1934; and respondent company thereby was and will be enabled to salvage a larger amount of its property than it could have done by competition. As to the remaining averments of Paragraph 17, respondent company is not advised and neither admits nor denies the same." (I-303)

"19. As to paragraph 19, respondent company is advised that TVA in coordination with the Public Works Administration aided and encouraged various of the respondent municipalities to apply for and obtain approval of grants and loans of PWA funds to enable them to enter into the business of distributing TVA power within the area served by respondent company; respondent company denies that TVA in addition held out to this respondent the threat of direct construction and competitive operation, and in that connection avers that TVA gave this respondent to understand that if TVA could not acquire respondent company's property the result would be competitive operation; and that a number of such grants and loans of PWA funds was formally or informally approved." (I-319-20)

When TVA terminated the option of August 9 shortly before trial; and, with lack of candor, but none the less aggressively, brought about a renewal of the PWA allotments to the towns, this company realized that unless this direct and uncontrolled competition by TVA were terminated by final adjudication as illegal, this company's survival would be dependent solely upon a repeal or amendment of the TVA Act, or an unexpected reversal of discretion by TVA.

The defendant Lilienthal, who directed the power program, had announced that he was, because of the public aspects of the program, without compunction—a new philosophy of government.[3]

Under these circumstances when the specific request for declaratory relief, following the change in position by TVA, was filed by petitioners, this Company might appropriately have requested cross-relief. To have done so would have been squarely within the sequence noted in *Chicago v. Mills,* 204 U. S. 321, 330 (51 L. ed. 504, 509-10).[4]

But that action would have resulted in a postponement of the hearing and was not necessary, as full relief

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[3]In a letter from Lilienthal to Willkie, dated June 20, 1934, the former stated: "The Tennessee Valley Authority believes that the acquisition by it of your properties in the allocated area in North Alabama will be a constructive method of meeting a situation which is difficult and which inevitably will lead to bitter feeling and the wastes of competition. The public interest is, therefore, directly involved, and I consequently feel none of the compunction which I might feel as a private individual in urging you earnestly to re-examine this matter with a view toward a constructive solution." (II-515-16)

[4]"It is true that subsequent events made it to the interest of the Company to make common cause with Mills against the enforcement of the ordinance in question, but when he began his suit no proceedings were pending which involved the important question of the power of the City upon which the complainant ultimately prevailed."

was within the scope of petitioners' original pleadings, as well as the amended and supplemental matter (III-1278 et seq.).

The right of petitioners to institute the suit was expressly upheld by the trial court. That conclusion was accepted by the Court of Appeals.

The Company here submits that the basic question presented by this record should be determined on this record.

For the question of procedure to be revived at this point would be adverse not only to the basic rights underlying this suit, but to the public interest.

Penna. Coal Co. v. Mahon, 260 U. S. 393, 413-14 (67 L. ed. 322, 325);
Chicago v. Mills, supra.

The record in this case peculiarly calls for a decree with sufficient elasticity to assure adequate relief. The trial court realized that the constant changes in the detail and method of the TVA program might require supplemental proceedings. Conclusion of Law No. 27 is set out in the margin.[5] It would involve a grave waste of

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[5] "27. The TVA power policy was not designed or limited with a view to the marketing of the power produced and available at Muscle Shoals. TVA did not propose to restrict new power installations either principally or primarily to governmental use, or propose to defer hydro-electric emplacements or installations until after some definite government uses had been planned or estimated to which the power production could be fairly related. Additional power installation was considered by the Board to be related rather to the question of power market and regional development and the ability of TVA to make further commercial sales of power or the effect on its power market of large blocks of power rather than to any estimated, rational or considered requirement for governmental use." (II-1042-43)

time and of expense, public confusion and misunderstanding for the validity of the Tennessee Valley Authority program in all its essential elements plainly represented on this record to be deferred or extended.

The management of this corporation are, after all, trustees for its stockholders. They earnestly desire instructions in the administration of their trust in this grave crisis.

That the Federal Government is constantly shifting its ground is not to be doubted on this record.

These facts are assured:

(1) The Federal Emergency Administration of Public Works has committed itself definitely to furtherance of the TVA program and to the establishment throughout the United States of so-called competitive yardsticks. If not less than six pending cases involving the validity of what the petitioners term "dynamic investments" by the Public Works Administration, that agency of the Government has, after the cases have reached the appellate courts, requested that the causes be remanded in order that there might be submitted to the trial court revised forms of contracts, the intention of which is to accomplish the same result, but in a different manner. It is to be regretted that this course of conduct is a characteristic attitude of the Public Works Administration and of the Tennessee Valley Authority as shown on this record.

(2) The intention to use federal funds to force sales of its property by this company is incontestible on

this record, under the joint cooperation of TVA and PWA. In the suit of the Tennessee Public Service Company, involving competitive duplication, as a result of TVA-PWA agreements documented from the public records in that suit, the Chancellor, in sustaining the bill, asserted that the evidence was sufficient to dispense with any formal joining of the Public Works Administration because of the established concert of action with the Tennessee Valley Authority.[6] Here both the defendant towns and the Tennessee Valley Authority are before the Court. As held by the District Court, PWA was nothing save an unincorporated arm of the Federal Government differing in no justiciable sense from the Tennessee Valley Authority.

The chief responsible actor in the matter of the PWA allotment to the City of Decatur (Henry T. Hunt, Esq., Record, II-691) actually appeared in this cause in the Court below (9 Fed. Supp. 800). The brief which he filed in the matter purported to be on behalf of Harold L. Ickes as Administrator, as amicus curiae.

(3) The adoption by Congress of the Amendment of August 21, 1935, but emphasizes the constantly shifting phases of the program in furtherance of the same identical objective. Under that amendment, in addition to the original $50,000,000 for steam or hydro units located wherever TVA may elect, the latter is accorded an additional $50,000,000 of bonds of the United States to aid municipalities in acquiring systems. In short, PWA makes the threat of competitive duplication and

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[6]See Appendix to Petitioners' Brief, p. 129.

TVA appears with an offer to purchase the distribution property at a fraction of its admitted bare bones value.

Under these circumstances it is not to be doubted that final and adequate relief should be granted on this record, first by basic injunctive determination of the illegality of the TVA program, supplemented by such declaratory action and supplemental relief as is necessary on the record or plainly potential.

(4) It is a matter of common knowledge that TVA has proceeded with aggressive energy where it is not restrained by injunction toward the perpetuation of its power system. The press in the States of Alabama, Mississippi, Tennessee, Arkansas and Kentucky, carries almost daily accounts of the agitation of TVA to render service to many communities, of its proposals to serve, and finally of the acceptance of the proposal.[7]

Immediate and Comprehensive Adjudication is Essential

Under the circumstances shown on this record, the conclusion is inevitable that TVA is attempting to broad-

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[7]Articles indicating one or more of these activities since the date of the decree in the court below are to be found in TVA press releases and in many daily newspapers published in the states named. From issues in the months of June, July, August, September and October, 1935, we take the name of the state and the county or community in which the activity occurs and the newspaper or release in which the article appears.

ALABAMA

Ardmore, Decatur, Hartselle, Huntsville and Scottsboro (Knoxville Journal 9/22); Blount, Cullman, DeKalb, Etowah, Jackson, Madison, Marshall and Morgan Counties (Huntsville Times 10/3).

MISSISSIPPI

Amory (Memphis Commercial Appeal 10/20); Ashland, Fayette, Lamar, Michigan City, Mount Pleasant and Slayden (Memphis Press Scimi-

cast and entrench its activities so as to make withdrawal

tar 10/15); Burnsville and Pickwick (Florence, (Ala.) Times, 9/27); Caledonia and other communities in Monroe County (Columbus Dispatch 10/16); Clay County (Memphis Commercial Appeal 9/15, Birmingham Age-Herald 10/27); Columbus (Columbus Advance 10/16); East Tupelo (Decatur Daily 10/21, TVA Press Release 10/21); Fulton (Birmingham Age-Herald 10/22); Holly Springs (Memphis Commercial Appeal 9/19, Memphis Press Scimitar 9/20, Florence Times (Ala.) 9/27); Itiwamba and Lee Counties (Florence Times 10/22, Huntsville Community Builder 10/22); Lee County (Florence Times 10/22, Huntsville Community Builder 10/25); Louisville (Memphis Commercial Appeal 7/15); Lowndes, Clay, Oktibbeha and Noxubee Counties (Birmingham Age-Herald 10/22, 10/27); Macon (Birmingham Age-Herald 10/27); Monroe County (Knoxville Journal 10/4, Tri-Cities (Sheffield, Ala.) Daily 10/15); New Albany (Birmingham Post 10/17, Tupelo News 10/17); Okolona (Knoxville Journal 7/13, Memphis Commercial Appeal 9/3, Birmingham Age-Herald 9/1, TVA Press Release 9/27); Oxford (Memphis Press Scimitar 8/30, 9/20, Memphis Commercial Appeal 9/19); Pontotoc, Prentiss and Tishomingo Counties (Knoxville News-Sentinel 10/18); Nettleton, Saltillo, Shannon, Sherman, Verona, (Decatur Daily 10/21); Guntown, Saltillo, Sherman, Verona, East Tupelo, Shannon, Nettleton, Fulton (TVA Press Release 10/21); Water Valley (Memphis Commercial Appeal 9/19, Memphis Press Scimitar 9/20); West Point (Memphis Commercial Appeal 9/15); Winston County (Memphis Commercial Appeal 7/15).

TENNESSEE

Anderson County (Knoxville Journal 10/16); Aspen Hill (Nashville Tennesseean 8/24, 10/11); Athens (Chattanooga News 9/23); Bedford County (Nashville Tennesseean 10/19, 10/29); Belleville, Bellview, Blanche, Boons Hill, Brighton, Camargo, Cash Point, Coldwater, Cyruston, Egam, Elora, Flintville, Frankewing, Howell Hill, Kelso, Kirkland, Liberty, Lincoln, Lynchburg, McBurg, Mimosa, Molina, Mount Pleasant, Murphreesboro, Pearl City, Taft, Yukon (Knoxville Journal 9/22); Birchwood (Chattanooga News 10/4); Bolivar, Dyersburg, Jackson, Milan, Trenton and Union City (Memphis Commercial Appeal 9/19, Memphis Press Scimitar 9/20); Braden, Macon, Rossville and Somerville (Nashville Tennesseean 9/19); Chattanooga (Memphis Press Scimitar 9/30, Chattanooga News 10/29); Cheatham, Hickman, Houston, Humphreys, Montgomery and Stewart Counties (Nashville Tennesseean 10/24); Clinton (Knoxville Journal 10/6); Columbia, Elkton, Franklin, Lawrenceburg, Lewisburg, McMinnville, Manchester, Shelbyville, Winchester (Knoxville Journal 9/22); Covington (Memphis Press Scimitar 9/30, Tuscumbia Times 10/22); Dayton and Wartrace (TVA Press Release 10/1, Chattanooga Times 10/11); Deason (Nashville Tennesseean 10/29); Dickson (Knoxville News-Sentinel 10/23, 10/24); Dickson County (Memphis Press Scimitar 10/22); Dyer, Fayette, Hardeman, Madison, Obion and Tifton Counties (Tuscumbia Times 10/22); East Brainerd, Fairmont in Red Bank, Falling Water, Fairview, Ganns, Gold Point and Middle Valley at Hixon (Chattanooga News 9/25); Fayetteville (Knoxville Journal 9/22, TVA Press Release 10/1); Gibson County (Tuscaloosa Times 10/22); Giles, Harden, Haywood, Meigs and Rhea Counties (Knoxville Journal

impracticable. A general declaration of the illegality of the program with instructions to the trial court to adapt the decree to the conclusion of illegality will clearly be appropriate.

There appears to be no reasonable question as to the appropriateness of declaratory relief on this record. See Declaratory Judgments, Borchard, 35, 40, 261-2, 274, 296-7, 311, 343, 405, 502, 504-5, 599, 624.

Under the prayer for general relief, relief under the Declaratory Judgments Act was plainly appropriate.

Texas v. Hardenberg (1869), 77 U. S. (10 Wall.) 68, 85-6 (19 L. ed. 839, 841-2);

Tyler v. Savage (1892), 143 U. S. 79, 97-8 (36 L. ed. 82, 89-90);

21 C. J. 679.

9/22); Grand Junction, Halls and Humbolt (Memphis Press Scimitar 9/28); Hamilton County (Chattanooga News 9/25); La Follette (Knoxville News-Sentinel 10/17); Lincoln County (TVA Press Release 10/1); McMinn County (Chattanooga Times 9/16); Maury County (Nashville Tennesseean 10/18, 10/24) Memphis (Memphis Press Scimitar 9/28, 9/30 10/23, Birmingham News 10/23); Paris (Nashville Tennesseean 9/9); Pulaski (Nashville Tennesseean 8/24, TVA Press Release 9/27); Rutherford County (Nashville Tennesseean 10/19); Tarpley (Nashville Tennesseean 10/11); Tipton County (Tuscumbia Times 10/22).

ARKANSAS

North Little Rock (Knoxville News-Sentinel 10/22)

KENTUCKY

Murray (Memphis Press Scimitar 10/21)

TRANSMISSION LINES

Ardmore, Ala. to Columbia, Tenn. (Birmingham Age-Herald 9/20, Tuscumbia Times 10/22); West Tennessee to North Mississippi (Memphis Commercial Appeal 9/19, Memphis Press Scimitar 9/20); Wheeler to Guntersville (Ala.) (Decatur Daily 10/3, Birmingham News 10/3); Wheeler Dam to Pickwick Dam (Florence Times 7/2, Memphis Commercial Appeal 7/3); Wilson Dam to Pickwick Dam (Florence Times 7/2); Wilson Dam to Wheeler Dam to Norris Dam (TVA Press Release 10/7); Tupelo to New Albany, Miss. (Knoxville News-Sentinel 10/18).

The Federal Declaratory Judgments Act had become a law on June 24, 1934 (48 Stat. 955, 28 USCA Sec. 400, Judicial Code, Sec. 274d). It is now provided for by Alabama statute, in substantially the form of the uniform act (Act approved September 7, 1935, General Acts, 1935, p. ——), Appendix p. 21.

Under established doctrine the grave controversy presented on this record calls for complete and final adjudication.

Marbury v. Madison (1803), 5 U. S. (1 Cranch) 137, 162 (2 L. ed. 60, 69);

Cohens v. Virginia (1821), 19 U. S. (6 Wheat.) 264, 405 (5 L. ed. 257, 291);

Osborn v. United States Bank (1824), 22 U. S. (9 Wheat.) 738, 819 (6 L. ed. 204, 223);

Pennsylvania v. West Virginia (1923), 262 U. S. 553, 591 (67 L. ed. 1117, 1129-30);

Terrace v. Thompson (1923), 263 U. S. 197, 215 (68 L. ed. 255, 274);

Pierce v. Society of Sisters (1925), 268 U. S. 510, 536 (69 L. ed. 1070, 1078);

Euclid v. Ambler Company (1926), 272 U. S. 365, 397 (71 L. ed. 303, 314-15);

Fidelity Nat. Bank v. Swope (1927), 274 U. S. 123, 134 (71 L. ed. 959, 965-66);

Old Colony Tr. Co. v. Comm'r. Int. Rev. (1929), 279 U. S. 716, 724 (73 L. ed. 918, 926);

Nashville, C. & St. L. Ry. v. Wallace (1933), 288 U. S. 249, 264-5 (77 L. ed. 730, 736).

Since the enactment of the Federal Declaratory Judgments Acts, Courts of Appeals and Districts Courts of the United States, except as to the case at bar, have rendered declaratory judgments in all instances where the question has arisen.

Black v. Little (1934), 8 F. S. 867, 870;
Penn v. Glenn (1935), 10 F. S. 483, 486;
Everglades Drainage & Development Corp. v. Fairbanks, Morse & Company (1935), 75 Fed. (2d) 794, 796.

In *Nashville, C. & St. L. Ry. Co. v. Wallace,* supra, the company was engaged in purchasing gasoline outside the state which it stored for its own use within the state. The taxing authorities, claiming that the statute taxed the privilege of storing gasoline and was applicable to the company, demanded payment of the tax. In lieu of payment the state was determined to enforce its demand. The company set up that under the circumstances the statute as applied to it was invalid under the commerce clause and the 14th amendment.

We set out in the Appendix (pp. 22-3) the Federal Declaratory Judgments Act and the pertinent sections of the like act of Tennessee.

The Court said:

"That the issues thus raised and judicially determined would constitute a case or controversy if raised and decided in a suit brought by the taxpayer to enjoin collection of the tax cannot be questioned. . . ."

N. C. & St. L. Ry. v. Wallace, supra, 261 (735)

In the case at bar the petitioners complain that the Tennessee Valley Authority Act is an unconstitutional delegation of legislative power to the executive department, and that it violates the Fifth and Tenth Amendments.

The litigation is

> "between adverse parties, seeking a determination of their legal rights upon the facts alleged in the bill" [Ib. 261 (735)]

and offered as legal proof in support thereof.

> " . . . valuable legal rights asserted by the complainant and threatened with imminent invasion by appellees, will be directly affected to a specific and substantial degree by the decision of the question of law; . . . The relief sought is a definitive adjudication of the disputed constitutional right of the appellant, in the circumstances alleged, to be free from" [Ib. 262 (735)]

the aggressions of TVA.

The

> " . . . adjudication is not . . . subject to revision by some other and more authoritative agency." Ib. 262 (735)

The petitioners are

> " . . . not attempting to secure an abstract determination by the Court of the validity of a statute, . . . or a decision advising what the law would be on

an uncertain or hypothetical state of facts, . . ." Ib. 262 (735)

> ". . . the Constitution does not require that the case or controversy should be presented by traditional forms of procedure, invoking only traditional remedies. The judiciary clause of the Constitution defined and limited judicial power, not the particular method by which that power might be invoked. It did not crystallize into changeless form the procedure of 1789 as the only possible means for presenting a case or controversy otherwise cognizable by the federal courts. . . . the ultimate constitutional purpose [of invoking the judicial power,] is the protection, by the exercise of the judicial function, of rights arising under the Constitution and laws of the United States. . . ." Ib. 264 (736)

If changes in the procedure in state courts do not preclude review by this Court,

> "so long as the case retains the essentials of an adversary proceeding, involving a real, not hypothetical, controversy, which is finally determined by the judgment below",

it is obvious that changes in federal procedure cannot bring about a different result.

CONCLUSION

An adjudication by this Court of the validity of the activities of the Tennessee Valley Authority now in motion and aggressively threatened on this record, and of the limits within which this agency of Congress is confined by the Constitution in ostensible exertion of the regulation of navigation under the Commerce Clause, as applied to direct and indirect commercial manufacture, commercial transmission, commercial and controlled distribution and federal investment, will settle the rights of these contestants and afford relief from the insecurity and controversy out of which this litigation arises.

Respectfully Submitted,

THOMAS W. MARTIN,

PERRY W. TURNER,

Wm. LOGAN MARTIN,

Attorneys for Respondent Alabama Power Company.

MARTIN, TURNER & McWHORTER,

Counsel.

CERTIFICATE OF SERVICE

Birmingham, Alabama.

I hereby certify that I have forwarded, postage prepaid, a copy of the foregoing brief to the following attorneys of record:

Messrs. Forney Johnston,
Attorney for the Petitioners;

W. H. Mitchell,
Attorney for the Respondent City of Florence;

Courtland Palmer,
Attorney for the Respondent Chemical Bank & Trust Co.;

Hon. Stanley Reed,
Solicitor General of the United States.

This December 15, 1935.

Wm. Logan Martin.

APPENDIX

ALABAMA GENERAL LAWS

(Regular Session, 1935)

No. 355) (S. 19—Simpson.

AN ACT

To provide that courts of record of the State of Alabama shall have the power to render declaratory judgments and to provide for practice and procedure in such cases.

Be it Enacted by the Legislature of Alabama:

Section 1. SCOPE. Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

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Sec. 8. SUPPLEMENTAL RELIEF. Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

Sec. 9. JURY TRIAL. When a proceeding under this act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.

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Approved September 7, 1935.

FEDERAL DECLARATORY JUDGMENTS ACT

(28 U. S. C. A. § 400)

Declaratory judgments authorized; procedure

(1) In cases of actual controversy the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

SECTIONS FROM DECLARATORY JUDGMENTS ACT OF TENNESSEE

(from Michie's Tenn. Code of 1932)

8835. *Rights, and other legal relations declared; declaration affirmative or negative; effect as final.*— Courts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such decla-

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.

ration shall have the force and effect of a final judgment or decree.

8842. *Further relief after declaratory judgment or decree, when; petition for.*—Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application therefor shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party whose rights have been adjudicated by the declaratory judgment or decree, to show cause why further relief should not be granted forthwith.

8843. *Issues of fact to be tried and determined as in other civil actions.*—When a proceeding under this article involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the court in which the proceeding is pending.